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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JOSEPH G. ROCHE, Plaintiff and Respondent, v. RAM'S GATE WINERY, LLC et al., Defendants and Appellants.	A150459, A150462 (Sonoma County Super. Ct. No. SCV259143)

In 2006, Ram's Gate Winery, LLC (Ram's Gate) purchased a Sonoma County winery from Dr. Joseph G. Roche (Roche) and his wife. Ram's Gate later sued the Roches for breach of contract, fraud, and negligent nondisclosure based on claims they withheld information about an earthquake fault on the property and made misstatements concerning the ability to build on an existing building pad. The protracted litigation ultimately ended with Ram's Gate dismissing the action, Roche paying nothing to Ram's Gate, and Ram's Gate paying most but not all of Roche's attorney fees.

Roche thereafter sued Ram's Gate, two of its members, and one of its attorneys for malicious prosecution, alleging they withheld documents in discovery that would have proved they knew or should have known about the earthquake fault before the close of escrow. The defendants filed special motions to strike the complaint as a strategic lawsuit against public participation (anti-SLAPP motions), with the attorney filing separately from the rest of the defendants. The motions were denied.

The defendants appeal from the denial of their anti-SLAPP motions. The issue is whether Roche showed with admissible evidence that he was likely to succeed on the merits. We conclude that he did and that defendants' motions were properly denied. We therefore affirm.

I. BACKGROUND

A. History of the Winery Purchase

1. *The Boudreau Report*

In the late 1980's, Roche and his wife, Genevieve Roche,[1] purchased a 135-acre ranch in Sonoma County with the plan of establishing a winery on it. That they did, but not before commissioning two studies of the property. The first, known as the Conforti site map, was conducted by architect Victor Conforti, in February 1987. An engineering geologist, Eugene Boudreau, prepared a second report (the Boudreau report) in July 1987. The Boudreau report was a soils report and earthquake study specifically required by the county because the property is located in a seismic special studies zone. (See Pub. Res. Code, § 2621 et seq. [Alquist-Priolo Special Studies Zone Act].)

The Boudreau report concluded that "[t]he principal hazards in the area are associated with faulting and earthquakes . . . ." The report summarized the findings of a 1982 "fault evaluation report" by a geologist from the California Division of Mines Geology, which showed "the Rodgers Creek Fault Zone to run from Santa Rosa to the Roche property." "[T]he Rodgers Creek is definitely considered to be an active fault." Drawings accompanying the report showed an earthquake fault, and specifically an "[a]ctive fault trace," on the Roche property and a "[p]ossible fault" near the proposed winery site.

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[1] Genevieve Roche passed away during the underlying litigation. Only Joseph Roche was a party to the malicious prosecution action and appeal. We therefore recite the facts as if Roche were the sole owner of the Roche Winery, without reference to any role Genevieve Roche may have played in establishing and running it.

After Boudreau's findings, it became clear the site initially considered for the winery was too close to an active earthquake fault. Boudreau's drawings pointed out a location that would allow the required 50-foot setback from the fault. The Conforti map was revised in 1988, evidently to take account of Boudreau's findings. The Conforti map was less detailed than Boudreau was in disclosing the earthquake faults, but also, as Boudreau did, contained information about the location of earthquake fault traces on the property.

2. *The Giblin and Harding Lawson Reports and the Offering Memorandum*

In 1996, CalTrans undertook a highway widening project on Highway 121, adjacent to the Roche Winery. Ghilotti Construction (Ghilotti), the contractor doing the work, needed a place to offload gravel and soil from the roadwork operations. Ghilotti suggested using the old road base to build a two-acre building pad behind the winery at no cost to Roche. Thinking he could use it to put up a warehouse, Roche agreed. The pad was built by Ghilotti under monitoring and inspection by the geotechnical engineering firm Giblin Associates (Giblin). Giblin provided Ghilotti with a final report (the Giblin report) indicating the pad had been built in accordance with grading plans prepared by civil engineers, and Ghilotti gave a copy of the final Giblin report to Roche.

Roche hired a second geotechnical engineering firm, Harding Lawson Associates (HLA), to perform soils consultation in the building pad area. In connection with its soils consulting work, HLA prepared and submitted to Roche a Fault Hazard Investigation proposal (the HLA proposal), which specifically recommended that to satisfy the requirements of the Alquist-Priolo Special Studies Zone Act a fault hazard investigation be undertaken before erecting a warehouse on the two-acre building pad built by Ghilotti. Roche never completed the additional seismic investigation recommended by HLA and never built the warehouse.

By early 2005, Roche Winery had filed for Chapter 11 protection in bankruptcy, and Roche sought to sell the winery, initially listing it for $10.5 million. The real estate broker for the sale, Catherine Somple, wrote the text of an Offering Memorandum about the property that, among other things, summarized the history of the building pad,

concluding with the following statement: "[Ghilotti built] the winery a free-of-charge, fully engineered, Sonoma County approved building pad. You can literally start building on it w/ no ground work. It was always the Sellers [*sic*] long term plan to construct a 'cut and cover' building there for production, and turn the current facility into a pure retail/office location."

3. *2005 Attempt to Purchase the Winery by JHP Land*

In July 2005, Michael John and John Hansen, became interested in buying the winery and formed a limited liability company (LLC), JHP Land, LLC (JHP Land), for that purpose. John and Hansen both were managers of JHP Land. They wanted to replace the existing winery with a new one that would be open to the public, sell specialty groceries, and be available to rent for special events. Carrying out that plan would have required expanding the property's permitted uses under Sonoma County's zoning law.

For JHP Land, whether the county would allow increased use of the property was an important issue. John and Hansen were represented by broker and attorney Lester Hardy and his law firm of Clement, Fitzpatrick & Kenworthy (the Clement firm) in the formation of JHP Land and purchase of the winery. The agreed-upon purchase price was $10 million. In connection with the purchase, the buyers sought disclosures from Roche relating to, among other things, the geological condition of the property and any geotechnical reports.

One of Hardy's law partners, Kathleen Winter, reviewed documents on file with the county relating to the Roche property, copying some of them and placing them into binders. One of the binders contained the Boudreau report. An e-mail from Davenport to Hardy dated August 1, 2005 says a binder of "disclosure documents" was being hand-delivered to Hardy that day. In addition, an email dated July 27, 2005 from Davenport to Hardy forwarding an email from Brendan indicates that various materials were being provided to Hardy, including "[a] [t]hree-ring binder cataloguing the construction of the winery, including engineering information, seismic information, plumbing, refrigeration,

etc. THESE ARE ALL ORIGINALS. Please look through it and make copies as needed, and return to us at your convenience." [2]

By mid-August 2005, John and Hansen lost interest in purchasing the property because, considering restrictions expected to be imposed by the county, the cost of building and running the winery would have made it impossible to service the debt. Accordingly, on August 11, 2005, John wrote a letter to Roche and his son, Brendan, terminating the deal and explaining why. Accordingly, Hardy apparently did not investigate the property further. John, through out-of-state lawyers, canceled the registration of JHP Land with the California Secretary of State.

4. *2006 Purchase of the Winery by JHP Land's Successor, Ram's Gate*

a. Purchase and Sale Agreement

After JHP Land backed out of the deal, Davenport asked for the materials Roche had provided to be returned, as required under the parties' agreement, because many of them were originals. Ram's Gate and Hardy never complied with that request.

In January 2006, Roche again put the winery on the market, asking the reduced price of $8.5 million. John and Hansen found another investor, Jeffrey O'Neill, and the three formed an entity initially known again as JHP Land, LLC, but which eventually was called Ram's Gate Winery, LLC.[3] With Roche under time pressure from his lender, the three investors, who were all initially designated managers, negotiated to buy Roche's

[2] Roche contends a copy of the Boudreau report was contained in a binder prepared by Roche's son, Brendan Roche, and provided to Ram's Gate through Roche's attorney, Thomas Davenport, in 2005. In ruling on the anti-SLAPP motion, the trial court declined to consider Brendan's declaration supporting that contention because Roche had not claimed in the underlying action that Brendan provided the binder. Rather, Roche had claimed he never possessed a copy of the Boudreau report and the only copy he knew of was on file with the county. Because we conclude the source of the binder does not matter for present purposes (see p. 30, *post*), we will treat the binder containing Boudreau's report as having originated with Winter (see pp. 31–32, *post*), not Roche's son. Because it ended up in Hardy's hands, we will sometimes call it "Hardy's binder."

[3] The LLC changed its name to "Carneros Vintners, LLC" in 2008 and to "Ram's Gate Winery, LLC" in 2010.

winery for $7 million. They again retained Hardy, now in his own firm,[4] to represent them in setting up Ram's Gate and handling the purchase of the property.

The parties entered into a purchase and sale agreement (PSA) on November 15, 2006. The name of the contracting purchaser was recorded as "JHP Land, LLC"—the same name as the entity Roche had dealt with in 2005. Roche and his attorneys, Davenport and Peter Simon, all have sworn under oath they did not know they were dealing with a different entity in 2006. We will refer to the entity created in 2006 as "Ram's Gate" to differentiate it from JHP Land created in 2005, even though Ram's Gate did not receive that name until 2010. (See fn. 3, *ante*.)

b. Required Disclosures

The PSA required Roche to produce to Ram's Gate, within 10 days, documents including "any known geological hazards; . . . soil reports, . . . geotechnical reports, . . . and all other facts, events, conditions or agreements which have a material effect on the value of the ownership or use of the Property . . . ." Ram's Gate then had 13 days in which to conduct its due diligence inquiry and to decide whether to go through with the purchase.

Roche and Davenport did not believe it was necessary to produce the same documents they had given to Hardy in 2005, since both transactions were handled by Hardy, the purchasing entity had the same name it had carried in 2005, two of the members were the same, and Hardy still had not returned the original documents Roche had produced in 2005. Among the documents produced by Roche during the 2006 due diligence period were the Giblin report and the HLA proposal.

The HLA proposal noted there were "active fault traces in the vicinity of the existing winery buildings" and cautioned that "[i]n the event fault traces are determined to underlie the building site it may be necessary to consider moving or reconfiguring the building to avoid encroachment into the area of potential fault rupture." Prior to building

[4] In early 2006, Hardy left the Clement firm and set up a solo practice.

any new structures on the building pad, HLA advised that Sonoma County would require "an investigation" to "be performed to satisfy the requirements of the Alquist-Priolo Special Studies Zone Act."

Roche's attorney, Davenport, sent those documents to Hardy via email on November 20, 2006. Hardy then forwarded all of the documents to the members of Ram's Gate (John, O'Neill and Hansen) and discussed the documents with his clients in an "Update" email dated November 27, 2006, which we shall describe in more detail below.

During the due diligence period, Roche sent to Hardy a "Roche Winery Disclosure List" which indicated "[n]one" on lines requesting information about "geological hazards" and "geotechnical reports." Also before the close of escrow, however, Roche produced to Ram's Gate, John and O'Neill (the Ram's Gate defendants) a "Residential Disclosure Report" by LGS dated November 29, 2006, which disclosed the property was in an Alquist-Priolo Earthquake Zone. Nevertheless, the Ram's Gate defendants claim to have relied on the "[n]one" entry on the earlier Roche Winery Disclosure List, without acknowledging they were informed of the property's being in an earthquake zone. The sale of the winery closed on December 14, 2006, with the purchasers taking title in the name JHP Land, LLC.

Shortly after the closing, Ram's Gate started preparations for building its winery and learned, allegedly for the first time, it could not build on the two-acre building pad without further seismic study. It turned out such a study would be expensive because there was a great deal of fill dirt under or around the building pad that would have to be trenched through to conduct the seismic investigation. Ram's Gate decided not to use the building pad and to put its building elsewhere on the property, incurring an additional cost of approximately $127,000 to do a seismic study. Sometime around April of 2008, Ram's Gate consulted attorney Thomas Hyde to look into the adequacy of Roche's disclosures.

Hyde, in representing Ram's Gate, asked Hardy for his files on the 2005 JHP Land transaction and the 2006 Ram's Gate transaction. With O'Neill's permission, Hardy

turned over his files to Hyde, including the binder containing the Boudreau report. It is unclear whether or when Hardy first read the Boudreau report, but it was present in the binder to which he had access long before escrow closed on the winery in 2006.

B. Ram's Gate's Action Against the Roches

On October 12, 2010, Ram's Gate filed an action (the underlying action) against Roche and his wife, the broker through whom they had listed the property (Somple), and Hardy, with Ram's Gate claiming fraud and negligent nondisclosure against the Roches and Somple, and breach of contract against the Roches. Against Hardy they alleged negligence and breach of fiduciary duty. The operative first amended complaint alleging the same causes of action was filed February 14, 2011. The negligent nondisclosure and breach of contract causes of action were based on Roche's alleged failure to disclose seismic information showing an active fault trace on the property, premised in large part on Roche's alleged failure to disclose the Boudreau report (referred to in the first amended complaint as the "1987 soils report") and the Conforti site map.

1. *Initial Withholding of Documents by Ram's Gate*

Ram's Gate brought suit accusing Roche of failure to disclose seismic information showing the presence of an active earthquake fault on the winery site despite Hyde's awareness—based on the Hardy binder—that there was evidence the Boudreau Report had been disclosed in the course of due diligence on the aborted 2005 sale of the winery to JHP Land. Ram's Gate then took a series of shifting discovery positions designed to justify not producing documents that would allow Roche to prove the Boudreau Report had been in Hyde's hands all along.[5]

At the outset of discovery, Roche requested, among other things, "all . . . communications between [Ram's Gate] and Defendant Lester Hardy" which "related to

[5] As a source of proof, Roche was dependent on documents produced in discovery, because JHP Land and Hardy never returned the originals of the due diligence material he provided in connection with the aborted 2005 transaction, and because his own copies of emails and other documents had been destroyed when his attorney's computer crashed.

this action" or to the Roche Winery. In response, Ram's Gate produced only 524 pages of documents—not including Hardy's binder or any communications about its contents. There was no objection on the ground that Hardy's communications had been with JHP Land, not Ram's Gate. Rather, Ram's Gate tried to shield any communications with Hardy by asserting attorney-client privilege. Ultimately, this attempt to assert the attorney-client privilege objection was overruled, for two primary reasons: first, Hardy was acting as a broker as well as a lawyer and many communications were not intended to be confidential, and second, Ram's Gate waived the attorney-client privilege by suing Hardy.

Ram's Gate was ordered to provide "complete responses" to Roche's document requests "without withholding documents under the attorney-client privilege," and required to produce a "privilege log" of documents withheld for *any* reason. Ram's Gate did none of these things. Its new tack was to deal with the waiver issue by dismissing Hardy, suing him separately, and reasserting attorney-client privilege.

2. *First Motion for Sanctions*

Because, months later, Ram's Gate was still ignoring the prior order to produce a log of anything still being withheld, in the Spring of 2012 Roche made a motion for sanctions, requesting not only a monetary sanction but the ultimate sanction of termination. Shortly before the hearing, Ram's Gate filed an amended supplemental response to the document request, claiming that "after conducting a diligent search," "all [responsive] documents [Ram's Gate] has received from Mr. Hardy . . . have already been produced."

Faced with Ram's Gate's repeated flouting of orders compelling production, the court's tentative ruling was to grant the requested terminating sanction. There is no doubt the trial court was inclined to view Ram's Gate's conduct as beyond the pale. "Although terminating sanctions are severe," the tentative ruling explained, "Plaintiff's actions have been misleading, and constitute an abuse of the discovery process. Further, Plaintiff's refusal to turn over the requested documents constitutes a blatant refusal to abide by the Court's order. There can be little doubt that documents have been withheld. As a result,

Defendants' [*sic*] have been deprived of an opportunity to prosecute this case and defend themselves."

Ultimately, however, the court gave Ram's Gate a reprieve, deciding not to enter a terminating sanction "at this time," awarding a $2,500 monetary sanction, and once again ordering compelled production. But the sanctions order excoriated Ram's Gate for stonewalling in document production. "The declaration of [Ram's Gate's] counsel makes no reference to review of any documents, withheld or otherwise," the court pointed out. "There is no explanation for how countless representations were made to this court and to the parties about the existence of the documents that had been withheld."

3. *Continued Withholding of Documents by Ram's Gate*

Despite having been admonished for making representations that it was not withholding discoverable documents (while it was doing just that based on an unsustainable privilege objection), the pattern of dissembling by Ram's Gate immediately resumed. Within a day of the trial court's sanction order issuing, on June 13, 2012—the day before Hardy's deposition was scheduled—Ram's Gate produced an additional 673 pages of documents, including 62 emails among the Ram's Gate principals, Hardy, Davenport, and the Roches. And once again, Ram's Gate claimed it had produced all responsive documents, including all communications with Hardy.

As it turns out, many more discoverable emails among Ram's Gate, its principals, and Hardy were still being withheld. The existence of some of these additional documents came to light on February 5, 2013 when Hardy produced a CD containing 2,316 pages of documents, consisting almost entirely of communications between himself and Ram's Gate's members, a document production Hardy made despite Hyde's request that he not do so. Around the same time, Roche served a second set of document requests, again seeking any documents concerning earthquake faults on the property and Ram's Gate's communications with Hardy.

Ram's Gate responded to Roche's second set of document requests on February 13, 2013 by claiming it would make all such documents available at Ram's Gate's place of business. That, too, was revealed to be inaccurate at the deposition of John, which

took place with a summary judgment motion by Roche pending. The John deposition commenced on February 21, 2013. He testified that he made "no attempt" to search for documents responsive to the document requests contained in his deposition notice. Although John testified he had "no documents" because he gave them all to O'Neill after the winery property was acquired, it was soon evident that John possessed emails and other documents that had never previously been produced.

John agreed at his deposition to search for discoverable documents and provide all email communication with his co-investors and with Hardy, but before any further production of documents based on that search could be made, on March 1, 2013 the trial court issued a ruling on the pending summary judgment motion. At this point, the original trial date was set for March 22, 2013, only weeks away. Just days prior to trial, Ram's Gate produced a CD containing over 17,000 of John's emails, many of which included attachments. This eleventh hour production consisted of approximately 60,000 pages, and was produced too late for Roche to use in connection with the already-decided summary judgment motion.

4. *Summary Adjudication Ruling and First Appeal*

Relying on the doctrine of merger by deed, the trial court granted summary adjudication to Roche on the breach of contract cause of action but denied summary adjudication as to the tort claims. Ram's Gate voluntarily dismissed the tort causes of action, without prejudice, to pursue an appeal on the contract cause of action.
To handle the appeal, Ram's Gate retained Steven Mayer and Sean SeLegue of Arnold & Porter Kaye Scholer, LLP (Arnold & Porter). In April 2015, a panel of this division reversed the summary adjudication for Roche, allowing the breach of contract cause of action to proceed in the trial court, and holding the doctrine of merger by deed did not preclude Ram's Gate from asserting the Roches' failure to abide by disclosure requirements in the PSA. (*Ram's Gate Winery, LLC v. Roche* (2015) 235 Cal.App.4th 1071, 1079–1083 (*Ram's Gate*).)

Following the appeal from the ruling on the summary judgment motion, the parties returned to superior court, where Ram's Gate continued to be represented by Arnold &

Porter, with Jonathan Hughes of that firm acting as lead trial counsel. Discovery resumed after remand. Ram's Gate did not reassert its fraud and negligent nondisclosure claims, though those claims had been dismissed without prejudice.

5. *Second Motion for Sanctions and Dismissal of the Action*

Trial was scheduled for April 15, 2016. Ten days before trial, Simon took O'Neill's deposition as the person most qualified (PMQ) to respond for Ram's Gate. The deposition notice requested, among other things, documents pertaining to earthquake faults on the property, communications regarding earthquake faults, documents disclosed by Roche before close of escrow, and documents provided by Hardy to Ram's Gate. On the morning of the deposition, Hughes emailed Simon that his office had learned of a "binder of materials" consisting of "Hardy's documents from the 2005 transaction" which had been in Hyde's possession. "My understanding," Hughes wrote, "is that the binder had not been previously produced and we are producing it today." Included in the binder was the Boudreau report—which amounted to a "smoking gun," as the course of events in the case would shortly reveal.

Confronted at his PMQ deposition with this new evidence, O'Neill admitted that: (1) Ram's Gate's agent Hardy had the Boudreau report in his possession before close of escrow; (2) the Boudreau report provided "much more detail" about active earthquake faults than the Conforti site plan; (3) there was no additional information, outside of what was contained in the Boudreau report, that O'Neill could identify as something Roche should have disclosed; and (4) after five and a half years of accusing Roche of having fraudulently concealed the Boudreau report and Conforti site map, O'Neill could no longer stand behind that charge. When asked if he knew with certainty whether the Boudreau report and Conforti site map had or had not been disclosed, O'Neill replied, "No, we don't know that definitively."

Two days later, Roche again moved for sanctions, again seeking monetary and terminating sanctions based on Ram's Gate's continued pattern of deliberately withholding discoverable documents—most crucially, Hardy's binder and the Boudreau report. Instead of allowing the motion to come on for a ruling, O'Neill, as manager of

Ram's Gate, decided to pull the plug on the case. The next day the parties agreed that Ram's Gate would dismiss the underlying action and pay Roche $600,000 in attorney fees and costs. A stipulated judgment was entered on April 13, 2016.

C. Roche's Malicious Prosecution Action

In July 2016, Roche filed a malicious prosecution action against Ram's Gate, John, O'Neill, and Hyde, seeking compensatory and punitive damages totaling upwards of $5 million.[6] The gist of the complaint is that Roche had disclosed to the defendants all the information required by the PSA prior to the close of escrow, so that the underlying action prosecuted against Roche was brought without probable cause and with malice. Roche alleged the defendants were trying to "shake down a 72-year-old man . . . for millions of dollars" in spite of knowing their accusations were false.[7] He claimed the defendants already had knowledge of the seismic condition of the property and could not have relied on any alleged nondisclosures because Ram's Gate's attorneys had in their files the Boudreau report, which fully disclosed the earthquake fault and active fault trace.

With respect to the two-acre building pad, Roche contends the alleged misstatements in the Offering Memorandum about the viability of building on it without further approvals could not have induced Ram's Gate's justifiable reliance because the HLA proposal, emailed to John and O'Neill before the close of escrow, disclosed the need to perform further seismic testing before building on the pad.

The Ram's Gate defendants filed an anti-SLAPP motion under Code of Civil Procedure section 425.16 (section 425.16), and Hyde filed a separate such motion. The

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[6] Hansen at some point severed ties with Ram's Gate and had no involvement in the underlying action. He is not a party to this litigation.

[7] Although the first amended complaint specified damages of only $127,403.79, Roche alleges in his malicious prosecution complaint, and in his declaration, that Ram's Gate demanded $5 million to settle the matter in early settlement talks. Hyde denies making such a demand.

motions were denied. The Ram's Gate defendants and Hyde filed separate appeals, but the two cases were consolidated for all purposes in this court.

Roche passed away while the appeal was pending, shortly before oral argument, and his counsel has represented that the representative of his estate will be substituting into this action in his place in due course.

II. DISCUSSION

A. The Law

1. *Anti-SLAPP Principles*

The anti-SLAPP statute requires a two-step analysis. First, the defendant must establish that the challenged claim arises from his or her act in furtherance of the "right of petition or free speech under the [federal or state] Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1).) " 'The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity.' " (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940 (*Sweetwater*).)

" 'If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. . . . [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] "[C]laims with the requisite minimal merit may proceed." ' " (*Sweetwater, supra,* 6 Cal.5th at p. 940.) On appeal from denial of an anti-SLAPP motion, we apply a de novo standard of review. (*Ibid.*)

2. *Malicious Prosecution*

A cause of action for malicious prosecution fits by definition into the scope of the anti-SLAPP statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734–735.) Hence, the first step of the analysis is satisfied, and we proceed to the second step.

The issue there is whether Roche provided sufficient evidence to make out a prima facie case of malicious prosecution, which requires a plaintiff to establish three elements: the underlying action was (1) initiated or maintained by, or at the direction of, the defendants, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (2) initiated or maintained without probable cause; and (3) initiated or maintained with malice. (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775 (*Parrish*); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965–966; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 213 (*HMS Capital*).)

B. Favorable Termination

1. *We Evaluate Favorable Termination Based on the Entire Action and the Surrounding Circumstances of the Dismissal*

Defendants contend Roche cannot show the claims against him were terminated in his favor. They suggest Roche was required to show that each of the causes of action they asserted against him was terminated in his favor. Under *Crowley v. Katleman* (1994) 8 Cal.4th 666, holding to the contrary, it is the action as a whole that must have terminated favorably. (*Id.* at pp. 684–685.) Thus, we need not decide whether Ram's Gate's voluntary dismissal of the tort claims following summary adjudication of the contract claim constituted a favorable termination of those causes of action; only the final judgment following Ram's Gate's agreement to pay $600,000 of Roche's attorney fees need be examined to decide whether it was a favorable termination for Roche.

"A ' "favorable" termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense it would support a subsequent action for malicious prosecution.' [Citation.] ' "[W]hen the underlying action is terminated in some manner other than by a judgment on the merits, the court examines the record 'to see if the disposition reflects the opinion of the court or the prosecuting

party that the action would not succeed.' " [Citations.]' [Citation.] 'Should a conflict arise as to the circumstances of the termination, the determination of the reasons underlying the dismissal is a question of fact. [Citation.]' " (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399 (*Sycamore Ridge*).)

The relevant circumstances here are these. After O'Neill's PMQ deposition on April 5, 2016, and facing Roche's motion for monetary and terminating sanctions, Ram's Gate decided to dismiss the underlying action. On Friday, April 8 at 5:06 p.m., Hughes, on behalf of Ram's Gate, emailed Simon that Ram's Gate would dismiss the action and pay Roche $500,000 in fees and costs. Simon responded at 5:15 p.m. that Roche, 76 years old at the time, was emotionally exhausted from the litigation and did not want any further "back and forth." Simon extended Roche's counteroffer of $600,000 in fees and costs, with the dismissal, requesting a response by 5:30 p.m.

Roche's actual fees and costs amounted to more than $725,000, but there is no evidence a precise figure had been calculated at the time the agreement was reached. The written counteroffer specifically says Roche and his attorney "do not consider this a settlement." Simon put Ram's Gate on notice that Roche retained his right to initiate a separate malicious prosecution action later. At 5:31 p.m., Hughes responded by email, expressing the belief that a malicious prosecution action would not succeed, but nevertheless agreeing to Roche's terms.

Ram's Gate dismissed the underlying action the following Monday, April 11. And on April 12, the parties entered into a stipulation for entry of judgment, which said in part: "It is intended that the judgment would preclude Roche from seeking additional costs or fees in this case, without waiving the right to seek them in a different action." Also, "[t]he parties do not intend to release or waive or otherwise interfere with any claims they may have, including, without limitation, any claim for malicious prosecution arising out of this action." The next day a "judgment for costs and fees" was entered, identifying Roche as the prevailing party and noting his entitlement to fees and costs under the PSA.

2. *The Unilateral Dismissal by Ram's Gate Is Presumptively A Favorable Termination for Roche*

The unilateral dismissal of a cause of action (except on technical or procedural grounds) is presumed to be a favorable termination on the merits unless otherwise proved to a jury. (*Sycamore Ridge*, *supra*, 157 Cal.App.4th at p. 1400**.)** "[T]he circumstances surrounding the dismissal of an underlying case for discovery abuse may justify a conclusion that a favorable termination on the merits occurred." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 217 [dismissal entered as terminating sanction was terminated favorably to defendant]; *Ross v. Kish* (2006) 145 Cal.App.4th 188, 192 [dismissal for plaintiff's refusal to be deposed was a favorable termination for defendant].) The same outcome is called for here, where Ram's Gate unilaterally decided to dismiss the underlying action rather than face a sanctions motion that almost certainly would have resulted in termination of the action and even greater financial liability.

While the stipulated dismissal may appear in form to effectuate a settlement, as signatures on behalf of both parties appear, we view it in substance as a unilateral dismissal. The defendants argue the dismissal was pursuant to a negotiated settlement and was not a termination favorable to Roche. (See *Ferreira v. Gray, Cary, Ware & Friedenrich* (2001) 87 Cal.App.4th 409, 413; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 27; *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.) It is true that where a case is dismissed pursuant to a give-and-take settlement, it "will not be viewed as a favorable termination as long as [the dismissal] was a necessary condition to achievement of the overall settlement." (*Villa v. Cole*, at p.1336.) That is because a dismissal pursuant to a settlement " 'reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant's guilt or innocence.' " (*Ibid.*; see also *Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 743–744 (*Siebel*.)

But the Supreme Court has cautioned against an unyielding rule that would make any resolution of a case by agreement ineligible as a basis for a subsequent malicious prosecution action. (*Siebel*, *supra*, 41 Cal.4th at pp. 742–743.) "Such a conclusion

would run counter to the policy favoring negotiated dispositions. A blanket rule could also bar legitimate malicious prosecution actions, allowing unscrupulous parties and/or their attorneys to hide behind its shield." (*Ibid.*) In *Siebel*, the court held an agreement by the parties to dismiss their appeals, without altering the underlying favorable judgment for Siebel, did not foreclose his later malicious prosecution action. (*Id.* at pp. 742–745.) The underlying substance and effect of an agreed dismissal—not its form—was the determining factor there, as it is here.

3. *In Light of the Circumstances of the Dismissal, Defendants Have Not Overcome the Presumption of Termination Favorable to Roche*

Pointing out that among the cases terminated by agreed resolution, only those that included a prior adjudication have been found to allow subsequent pursuit of a malicious prosecution action, the defendants argue that a favorable termination requires an adjudication. Their position is belied by the oft-repeated principle that to determine whether an agreed resolution constitutes a favorable termination, "the reasons underlying the termination must be examined to see if it reflects the opinion of either the court *or the prosecuting party* that the action would not succeed." (*Haight v. Handweiler* (1988) 199 Cal.App.3d 85, 88, italics added; accord, *Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 456 (*Antounian*).) "It is not essential to maintenance of an action for malicious prosecution that the prior proceeding was favorably terminated following trial on the merits." (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.) Thus, we do not accept the premise that a trial or any other kind of adjudication is a sine qua non for finding favorable termination in the case of a unilateral dismissal.

The record here leaves little doubt that Ram's Gate unilaterally decided to dismiss the action independently of Roche's agreement to accept less than the full amount of his fees and costs. In the face of a second request for terminating sanctions (something it had narrowly averted once before), Ram's Gate made an uninvited, unilateral offer to dismiss the underlying action, requiring no quid pro quo. Knowing it would be liable under the PSA for all of Roche's attorney fees if the breach of contract cause of action went to trial, and facing potential additional monetary sanctions, Ram's Gate proposed to pay half a

million dollars in Roche's attorney fees. There was no suggestion that Ram's Gate would not dismiss the action if Roche refused to accept discounted attorney fees, and Ram's Gate was in no position to play hardball.

Under these circumstances, we conclude that the dismissal of this action does not reflect a compromise driven by uncertainty over the merits. As we read the record, an outcome unfavorable to Ram's Gate was sealed by its own conduct, and the only remaining issue when Hughes approached Simon to discuss terms on April 8 was whether anything could be done to minimize its exposure to attorney's fees. The expense-saving discount that was offered cannot fairly be called a "settlement" of the entire case. In light of O'Neill's declaration explaining Ram's Gate's decision to fold, and the pressure Ram's Gate was under at the time, the inference is unavoidable that the decision to abandon the litigation was made independently of how much Ram's Gate would pay Roche for his legal fees.

O'Neill's declaration states that he decided "we would not continue with the litigation" after discussing the pending sanctions motion with Hughes. He says he decided to dismiss the action in large part because he feared a worse result if the case went forward, in light of the pending motion for monetary and terminating sanctions and because, even if the case went to trial, "a jury could be critical" of Hyde's handling of the Boudreau report and hold that against Ram's Gate. O'Neill had in mind the fee shifting provision of the PSA and was obviously concerned about potentially having to pay the full measure of Roche's fees and costs. He was especially concerned about having sanctions imposed by the court because he "knew the court previously had been very frustrated with Hyde's handling of discovery and had almost terminated the case in 2012 . . . ."

We view the parties' agreement with respect to the amount of attorney fees Ram's Gate would pay to Roche as an "ancillary" matter and not a settlement of the action such as would foreclose a finding of favorable termination for Roche. (See *HMS Capital, supra*, 118 Cal.App.4th at pp. 215–216.) In *HMS Capital*, as here, the subject of the "settlement" was merely a reduction in the amount of costs claimed by the prevailing

party. In that case, the Second District held a settlement was "ancillary" to the merits of the claim and did not foreclose a later action for malicious prosecution. (*Id.* at p. 215.) The same reasoning applies here. The final chapter in the underlying case was a surrender, not a negotiated settlement.

C. Lack of Probable Cause

On the question whether there was probable cause to pursue the underlying action, we review the elements of each cause of action individually. (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 459.) The decision on the probable cause element is normally made by the court as a matter of law based on an objective assessment of the merits of the underlying action. (*Parrish, supra,* 3 Cal.5th at p. 776; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 877–882 (*Sheldon Appel Co.*).) Our review is de novo. (*HMS Capital, supra,* 118 Cal.App.4th at p. 212.)

1. *Any One Cause of Action Unsupported by Probable Cause Is Enough to Form a Basis for a Malicious Prosecution Action*

As a threshold matter, the parties disagree about the consequence of a determination that probable cause was lacking for one cause of action, but not for all causes of action. Regardless of whether there was probable cause for the breach of contract claim or the claim for negligent nondisclosure of earthquake faults, the defendants argue there was probable cause for Ram's Gate's fraudulent misrepresentation claim with respect to the building pad. They argue that if even one cause of action alleged in the first amended complaint was supported by probable cause, Roche's malicious prosecution action is foreclosed.

In support of this argument, defendants rely heavily on *Antounian, supra,* 189 Cal.App.4th 438, which involved a case brought in federal court against George and Marijeanne Antounian by manufacturers of upscale handbags for trademark infringement and counterfeiting. (*Id.* at pp. 441–442.) Alleging the Antounians were selling counterfeits of these handbags, the manufacturers based their complaint on purchases by private investigators who were somewhat confused about the addresses where they actually bought the counterfeits because independent vendors had set up stalls and stands

in front of the Antounians' shop and adjoining shops. (*Id*. at pp. 442–444.) The investigative reports included some allegations pertaining to the Antounians' shop that were later recanted, while some allegations about the shop were not. (*Id*. at p. 445–446.)

Because the confusion left room for a jury to find that some of the counterfeit goods had come from the Antounians' shop, the Court of Appeal concluded the allegations against the Antounians that remained unrecanted were sufficient to show probable cause for bringing the action and hence barred a subsequent malicious prosecution action. (*Antounian*, *supra*, 189 Cal.App.4th at pp. 446–453.) Defendants claim *Antounian* supports their position that where some facts are shown not to support a cause of action, but other facts relied upon by the plaintiffs in the underlying action remain viable, the underlying action must be viewed as supported by probable cause, and a subsequent malicious prosecution action is barred.

We do not agree. First, it is incorrect that a finding of probable cause for bringing one cause of action will result in the later malicious prosecution action being barred. *Antounian* involved a single cause of action, unsupported by some evidence upon which the plaintiffs relied but supported by other evidence. It stands for no broader principle than this: when the defendant in a malicious prosecution suit is able to produce substantial evidence to support the sole cause of action it alleged against the malicious prosecution plaintiff in the underlying litigation, the existence of contrary evidence will not prove the underlying action to have been meritless, and thus a later action for malicious prosecution is barred. By contrast, we deal with separate causes of action, one for nondisclosure and one for affirmative misrepresentation.

The Fourth District, Division Two recently addressed such a situation in *Cuevas-Martinez v. Sun Salt Sand, Inc.* (2019) 35 Cal.App.5th 1109 (*Cuevas-Martinez*). It held that if any of the underlying causes of action is not supported by probable cause, the malicious prosecution action must be allowed to go forward. (*Id*. at pp. 1118–1119.) *Cuevas-Martinez* involved an underlying action by husband-and-wife restauranteurs (the Nuranis) against a former cook employee (Cuevas-Martinez) who opened his own hamburger restaurant, allegedly stealing his former employers' recipes. (*Id*. at pp. 1113–

1114.) The Nuranis alleged causes of action for misappropriation of trade secrets, intentional interference with contractual relationships, and other claims, including conversion related to equipment allegedly stolen by Cuevas-Martinez from the Nuranis' restaurant. (*Id*. at pp. 1113–1114.) Cuevas-Martinez prevailed on summary judgment against the Nuranis on all causes of action and later sued them for malicious prosecution. (*Id*. at p. 1114, 1116.)

In response to an anti-SLAPP motion brought by the Nuranis, the Court of Appeal found the trade secrets and intentional interference claims were not supported by probable cause because: (1) there was insufficient evidence that the Nuranis' recipes were trade secrets and strong evidence they were not, and hence no probable cause existed for the first cause of action; and (2) the Nuranis had no contractual relationships with their suppliers, so the second cause of action was also unsupported by probable cause. (*Cuevas-Martinez, supra*, 35 Cal.App.5th at pp. 1114–1115, 1120–1122.) The Nuranis argued that the remaining allegations not covered by those two findings still supplied probable cause for the underlying complaint, thereby blocking Cuevas-Martinez's malicious prosecution action. (*Id*. at pp. 1118–1119.) But the Court of Appeal disagreed, concluding that any one cause of action unsupported by probable cause is enough to form a basis for a malicious prosecution action. (*Id*. at pp. 1119–1121.) The same analysis applies here. We therefore reject the argument that a showing of probable cause on defendants' building pad claim, alone, would defeat Roche's malicious prosecution claim as a matter of law.

Ram's Gate's *Antounian*-based argument is off-the-mark factually as well as legally. Recall the Offering Memorandum described the building pad as "fully engineered," "Sonoma County approved," and said, "You can literally start building on it w/ no ground work." A fraud claim requires *justifiable* reliance on the misstatement. (*Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142, 1151.) Roche established, based on emails produced by Ram's Gate late in discovery, that Davenport

had forwarded the HLA proposal and Giblin report to Hardy on November 20, 2006.[8] The information in the HLA proposal clarified that the building pad would be subject to further seismic study before any building could occur, thereby correcting any false impression that might have been created by puffery in the Offering Memorandum.

Without further inquiry, no reasonable person in such circumstances would have relied on assurances in the Offering Memorandum of immediate buildability or about the building pad being "fully engineered." Hyde, who takes the lead for the defendants in the appellate briefs on the building pad misrepresentation argument, insists the HLA proposal only reinforced Ram's Gate's reliance on the false statement in the Offering Memorandum because the members assumed further seismic studies had been performed and necessary permits had been obtained, even though no such documents had been produced by Roche. We reject that argument not only as an unreasonable interpretation of the evidence, but as contrary to the meaning Hardy ascribed to the HLA proposal when he sent it to his client in November 2006.

2. *The Interim Adverse Judgment Rule Does Not Apply*

The defendants rely on the "interim adverse judgment rule" which would counsel that because Roche suffered an adverse ruling on a motion for summary adjudication of the tort causes of action in the underlying action, those causes of action had sufficient merit to overcome any suggestion they were filed without probable cause. (*Parrish*, *supra*, 3 Cal.5th at pp. 776–777.) And, Ram's Gate claims, this court's reversal of the trial court's grant of summary adjudication on the contract cause of action also makes Roche's complaint vulnerable to an anti-SLAPP motion. Defendants argue we may only decline to apply the interim adverse judgment rule if we find (i) the interim decision was

[8] In the November 27, 2006 "Update" email Hardy sent to the Ram's Gate Defendants, he cautioned: "Please note that the engineer expressly advises that additional engineering may be required before construction. My recommendation is that we contact the engineers (Giblin & Associates) if you need or want any additional insights into the present condition." There is no evidence that Ram's Gate took any further action in response before escrow closed.

induced by fraud or perjury and, (ii) but for such misconduct Roche would have prevailed on the summary judgment motion and appeal. (*Parrish*, *supra*, 3 Cal.5th at p. 778; *Antounian*, *supra*, 189 Cal.App.4th at pp. 450–452.)

We reject this line of argument as well. Both the ruling on summary adjudication and the appellate opinion rested on the false premise—put forth by Ram's Gate—that Hardy, O'Neill and John were ignorant of the Boudreau report and the Conforti site map[9] until after the close of escrow. (*Ram's Gate*, *supra*, 235 Cal.App.4th at p. 1077.) Yet, John had said in March 2010, before the underlying action was filed, that he was not "100% certain" he had not seen the Boudreau report before escrow closed. That should have alerted Hyde to investigate the facts further. Although Hyde presented a declaration in support of his anti-SLAPP motion indicating he believed his clients could be charged with knowledge of the contents of the Boudreau report only if they had "actual knowledge," the position he took there is contrary to the law. (Civ. Code, § 2332.)

The idea that Hyde's clients cannot be charged with information in his hands unless they had "actual knowledge" of it rests on the premise that JHP Land and Ram's Gate were two completely different entities and that the knowledge Hardy gained in representing one entity cannot be imputed to the members of the other. That is incorrect. The attorney is the client's agent. Whether John had seen it or not, the Boudreau report was in Hardy's binder in 2005, and knowledge of the document is therefore imputed to John as a manager of JHP Land. (Civ. Code, § 2332 ["As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."].)

[9] It is unclear if the Conforti site map was also in Hardy's binder. O'Neill claims his first knowledge of it was when Roche and Brendan gave it to him at a post-closing meeting in June 2007. We base our holding solely on the defendants' failure to produce the Boudreau report during the underlying litigation.

Even assuming Brendan Roche did not send Hardy the binder,[10] it also remains the case that Winter had knowledge of the Boudreau report, which in turn gave Hardy, John and Hansen imputed knowledge of it during the disclosure period in 2005. The knowledge imputed to those individuals did not evaporate when O'Neill joined as an investor and Ram's Gate was formed. O'Neill was not a party to the 2005 failed transaction, but Hardy's possession of the report during the 2006 disclosure period gave O'Neill, as managing member of Ram's Gate, imputed knowledge of its contents before escrow closed. A lawyer and broker for the purchaser in a complex commercial real estate transaction cannot ignore an important document in his or her own file while conducting due diligence and then claim to have been misled by the seller's failure to disclose that same document.

Had the true facts been in the summary judgment record, the trial court's ruling on the summary adjudication motion on the tort claims and the appellate opinion on the contract claim likely would have been different. We need not find fraud or perjury to avoid application of the interim adverse judgment rule, as the Ram's Gate defendants argue. The Supreme Court long ago held that fraud or perjury " 'or other unfair conduct' " could preclude application of the interim adverse judgment rule. (*Carpenter v. Sibley* (1908) 153 Cal. 215, 218 (*Carpenter*).)

The *Parrish* court, to be sure, declined to hold that "inadvertent reliance on factual inferences that turn out to be unsupported at trial" amounted to " ' "other unfair conduct." ' " (*Parrish*, *supra*, 3 Cal.5th at p. 783.) But it did not overrule *Carpenter*, and it acknowledged "there may be circumstances in which an interim ruling rendered at one point in the litigation will not, due to intervening circumstances, establish the existence of probable cause to continue the litigation." (*Ibid.*) Here, Hardy and Hyde had maintained

[10] The trial court excluded Brendan Roche's declaration from evidence for purposes of the anti-SLAPP motions. Roche answered discovery to the effect that he never received a copy of the Boudreau report. He did not assert that Brendan Roche produced the Boudreau report to JHP Land in 2005, but he did say he did not have the Conforti site map because "I gave it to Plaintiff."

the Boudreau report in their files since 2005 and 2008, respectively, and Hyde had read it—knowing it had been obtained from Hardy's due diligence binder—before drafting the initial underlying complaint, and he retained it throughout discovery.

An attorney is an officer of the court and owes the court a duty of candor. (*United States v. Associated Convalescent Enterprises, Inc.* (9th Cir. 1985) 766 F.2d 1342, 1346.) The duty of candor requires attorneys to use "those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d).) Improperly withholding crucial evidence called for in discovery surely qualifies as an "artifice." Pretrial discovery may have been unknown at the time *Carpenter* was decided, but we think that, where a willful discovery violation (or series of such violations) results in the presentation of a materially false or misleading record on a merits motion or an appeal, that qualifies as "unfair conduct" under the rule enunciated in *Carpenter*.

As *Parrish* observed in the context of limits on the interim adverse judgment rule, plaintiffs and their attorneys "have no right to mislead a court about the merits of a claim in an attempt to procure a favorable ruling, and such a ruling can provide no reliable indication that the claim was objectively tenable." (*Parrish*, *supra*, 3 Cal.5th at p. 778.) We are convinced that, if the trial court had been aware that Winter and Hardy had received the Boudreau report in 2005—whether from the county files or from Brendan Roche—it would not have found the negligent nondisclosure claim tenable with respect to the claim that the Roches concealed information about earthquake faults on the winery property.[11]

While we do not suggest that any of the Arnold & Porter lawyers were complicit—in pursuing the prior appeal, they inherited a summary judgment record that their client created before their retention, and it was Hughes, after all, who acted quickly

[11] Likewise, if the court had known the HLA proposal and Hardy's summary of it had been known to John and O'Neill prior to the close of escrow, the fraud claim relating to the building pad would have been vulnerable to summary adjudication against them for failure to produce evidence of justifiable reliance.

to disclose the existence of Hardy's binder when he discovered it in connection with the O'Neill deposition following our remand—we are nevertheless convinced that this court, too, was misled by Ram's Gate's failure to produce Hardy's binder in discovery regarding the facts underlying the breach of contract cause of action.

Davenport now declares under oath that Hardy never returned the original materials produced by Roche in the 2005 disclosure period. Because the binder was not produced in discovery and because Roche's attorney's computer crashed (see fn. 5, *ante*), Roche could not prove Ram's Gate had notice of the earthquake fault traces on the winery property. As a result, Roche was forced into the position of arguing on appeal that Ram's Gate should have discovered for itself there were active earthquake fault traces on the property by finding the Boudreau and Conforti reports among the records filed with the county. (*Ram's Gate*, *supra*, 235 Cal.App.4th at p. 1077.) This was a weaker argument than he could have made had Ram's Gate complied with its discovery obligations. Hyde and Ram's Gate knew all along that Winter had, in fact, found and copied the Boudreau report from the county records in 2005, making it impossible for Ram's Gate justifiably to claim resulting damages from Roche's alleged nondisclosure.[12]

The *Ram's Gate* opinion recited and relied on the fact that "Ram's Gate claims that it found out about the existence of documents relating to an active fault trace on the property only in mid-2007." (*Ram's Gate*, *supra*, 235 Cal.App.4th at p. 1085.) Had the true facts been in the summary judgment record, and hence the record on appeal, the panel deciding *Ram's Gate* likely would have taken a different view of Ram's Gate's proposition that the obligations imposed on Roche under the PSA survived close of escrow. (*Id*. at pp. 1079–1083.) Moreover, in light of Hardy's possession of the 2005 due diligence binder, Ram's Gate could not have credibly claimed it was damaged by

[12] "Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain. (Civ. Code, §§ 3300, 3301.)" (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 233.)

Roche's purported breach of a disclosure covenant and warranty obligation (*id.* at p. 1094). Indeed, it seems unlikely there would have been any need at all for the court to engage in the painstaking analysis of the merger by deed doctrine that resulted in reversal on appeal. (*Id*. at pp. 1079, 1081, fn. 2, 1084.)

In sum, it appears to us that Ram's Gate was able to present its claim of nondisclosure in the trial court and on appeal—without meaningful contradiction—only by willful suppression of evidence in discovery, conduct for which it was sanctioned and stood to be even more severely sanctioned had it not dismissed its action against Roche. Thus, we conclude that this is one of those situations where, as a result of " 'fraud, perjury or subornation of perjury, or other unfair conduct on the part of the defendant, the presumption of probable cause is effectually rebutted.' " (*Carpenter*, *supra*, 153 Cal. at p. 218.)

3. *Any Reasonable Attorney Would Agree that Ram's Gate's Action Against Roche Was Totally and Completely Without Merit When Filed*

"[T]he probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 878.) A claim is unsupported by probable cause if any reasonable attorney would agree that it is totally and completely without merit. (*Parrish*, *supra*, 3 Cal.5th at p. 776.)

The defendants, and especially Hyde, rely on a technical and formalistic argument that JHP Land was a separate entity from Ram's Gate, and because Hardy acquired the Boudreau report in connection with the 2005 aborted transaction, only JHP Land may be charged with imputed knowledge of the document. Hyde claims the Ram's Gate defendants had no imputed knowledge and had no obligation to produce the Boudreau report during discovery in the underlying action because it had been discovered by Winter and Hardy in the 2005 negotiations, not the 2006 negotiations. These arguments are specious.

Ram's Gate eventually (but belatedly) produced in discovery an email dated March 4, 2010, by which Hyde forwarded to O'Neill a copy of the Boudreau report found in Hardy's binder and asked if he had ever seen it. Hyde noted "[t]he diagrams attached to the report depict the faults better than the site plan from Conforti that you sent me. This report was among the documents that Lester [Hardy] had." O'Neill replied that he did not remember having ever seen Boudreau's report and forwarded the report to John. John responded, while he thought he had not seen it, "it has been so long ago [that] I don't know that I could be 100% certain." Despite this ambivalent answer and Hyde's knowledge that the report had been found in Hardy's binder compiled in 2005, on March 20, 2010, Hyde, on behalf of Ram's Gate (still referring to it as JHP Land), sent a demand letter to Roche claiming Ram's Gate had been in the dark about the earthquake issues when the sale of the winery closed.

Some seven months later, with no evident investigation into how the Boudreau report came to be in Hardy's binder—or the legal significance of the fact that it was found there—Hyde filed on behalf of Ram's Gate the underlying action against the Roches. It therefore appears that Hyde and the Ram's Gate defendants not only had possession of the Boudreau report, but had obtained it in a manner that suggested its contents had been known (or should have been known) by their attorneys (Hardy and Winter) long before the 2006 close of escrow.

While the members of Ram's Gate may have had no *actual* knowledge of the contents of the Boudreau report before the close of escrow, their attorneys had such knowledge, or access to such knowledge from their own files. They evidently knew enough to sue Hardy for negligence and breach of fiduciary duty, yet they claim unawareness that the knowledge he and Winter possessed precluded a legitimate claim against the Roches. From whatever source Hardy received it, the Ram's Gate defendants do not now dispute that Hardy, before close of escrow, and later Hyde, had possession of

the binder containing the Boudreau report, compiled in connection with JHP Land's proposal to buy Roche Winery in 2005.[13]

Whether Hardy actually read the Boudreau report is less certain; he testified he had no recollection of reviewing it. He further testified that, in 2005, "my instructions from my client were to scrutinize the concern [they had] about entitlements" because that issue would determine whether their plans for expanded commercial activities at the winery could be financially viable. Whatever may have been the focal point of his investigatory efforts in 2005, we conclude, as we explain further below, that Hardy had a professional obligation to know what was in his files when he conducted the 2006 due diligence review. He either knew or should have known before the close of escrow that there was an active earthquake fault trace on the Roche property.

Hardy never produced the binder nor any of the county's records when he responded to a subpoena duces tecum in the underlying action in 2012. Hyde, who evidently received the binder in 2008, never produced it in discovery in the underlying action, despite that it was called for by Roche's document requests. Hughes stepped in at the last minute before trial in 2016 and insisted on its production. We find it unnecessary to know exactly how Hardy came into possession of the binder. Because JHP Land's attorneys had the Boudreau report in 2005, John and JHP Land had constructive knowledge of the report during that disclosure period.

The defendants suggest that only if Hardy had the Boudreau report specifically in mind during the 2006 due diligence period would knowledge of the Boudreau report be imputed to Ram's Gate. They point to Hardy's testimony that he did not review the Boudreau report during the 2005 due diligence period because it was beyond the scope of what his client had asked him to do. Hyde also argues that JHP Land and Ram's Gate were "entirely different client[s]," and even assuming Hardy acquired imputed

[13] Hyde does dispute this point, claiming "[t]here is no evidence that Hardy had the binder at any time before 2008." There is, however, a strong inference he received the binder in 2005.

knowledge of the Boudreau report in 2005, it was not present in his mind in 2006, so the knowledge cannot be imputed to Ram's Gate.

The rule defendants seek to invoke applies only when an attorney gains knowledge in the representation of one client or other business engagement prior to the representation of a different client, or if the client is the same but the transaction is different. (*Otis v. Zeiss* (1917) 175 Cal. 192, 195–196; *Cooke v. Mesmer* (1912) 164 Cal. 332, 338–339; *Wittenbrock v. Parker* (1894) 102 Cal. 93, 103; *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 439 [escrow agent]; *Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1413.) While deciding not to invoke the rule of imputed knowledge for various reasons, these cases all recognize that an agent's knowledge from a prior transaction may be imputed to his or her principals in a subsequent transaction, especially where "the [later] transaction . . . closely follows and is intimately connected with a prior transaction in which the agent was also engaged." (*Wittenbrock*, *supra*, 102 Cal. at p. 103.) Here, the transaction was essentially the same (purchase of the Roche Winery) and the clients were different only in that O'Neill was added as a third member of the new LLC. The time lapse was roughly 15 months. We do not accept the suggestion that JHP Land and Ram's Gate should be treated as entirely different clients on this record, since they observed no such formal distinction themselves when sharing information.[14]

The defendants define too narrowly the circumstances under which an attorney's knowledge is imputed to the client. When a client retains an attorney, he or she retains the entire firm. (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 392.) "[T]he knowledge of an attorney is the

[14] Among O'Neill's statements in forwarding the Boudreau report to John was this: "The attached was discovered in Lester Hardys [*sic*] files *after I asked him to send all his documents to Tom [Hyde]*." (Italics added.) That it was O'Neill, not a member of JHP Land, who asked Hardy to forward his files to Hyde strongly suggests the Ram's Gate defendants and their attorneys did not respect JHP Land and Ram's Gate as two separate entities for purposes of sharing information, as the defendants now insist we must do.

knowledge of his [or her] client," so long as it is knowledge acquired "in the course of the particular transaction in which he [or she] has been employed by that principal." (*Otis v. Zeiss*, *supra*, 175 Cal. at pp. 195–196.) Here, Winter—a partner at the Clement firm—clearly had knowledge of the Boudreau report. It is not just the lead partner's knowledge that will be imputed to the client, but the knowledge of any attorney in the firm who worked on the transaction, at least as to those matters learned in connection with the transaction to which he or she was assigned to work.

Under general agency principles, "an attorney is his client's agent, and . . . the agent's knowledge is imputed to the principal even where . . . the agent does not actually communicate with the principal, who thus lacks actual knowledge of the imputed fact." (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 828; see also *Lazzarevich v. Lazzarevich* (1952) 39 Cal.2d 48, 50; *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230–1231 [concluding law firm's knowledge of fact was imputed to clients]; Civ. Code, § 2332; Rest.3d Agency, § 8.11.)[15] Thus, "notice in regard to the subject-matter of the employment, to one of a number of attorneys employed by a client, is notice to the client." (Annot., *Imputation of attorney's knowledge of facts to his client* (1919) 4 A.L.R. 1592, § VII [Knowledge of partner or clerk of attorney].) This principle of imputed notice is irrebuttable. (*Herman*, at p. 828.)

The defendants leave Winter's knowledge completely out of the picture, but she cannot be ignored. It does not matter whether she communicated to Hardy the contents of the Boudreau report; Hardy had imputed knowledge of anything Winter should have communicated to him as a partner. (See Corp. Code, § 16102, subd. (f).) Winter's

[15] "An agent has a duty to use reasonable effort to provide the principal with facts that the agent *knows, has reason to know, or should know* when [¶] (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and [¶] (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person." (Rest.3d Agency, § 8.11, italics added.)

knowledge of the Boudreau report must be imputed to JHP Land during the due diligence period in 2005, and to John as a manager of that entity, regardless of whether Hardy personally read the report or communicated its contents to John. (*Ibid.*) Winter's knowledge was imputed to Hardy as her partner and to John as their principal. The same rule applies to a limited partner (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 126–128), and by extension, to members of an LLC.

More fundamentally, there is attribution to Ram's Gate through Hardy, who evidently retained possession of the due diligence binder in 2006. That gave O'Neill, as manager of Ram's Gate, constructive knowledge of its contents during the 2006 due diligence period.[16] In our view, Hardy had a duty as broker and lawyer to know what was in the 2005 due diligence binder whether it was compiled by Winter or produced by Roche. (See Rest.3d Agency, § 8.08; see also Cal. Rules Prof. Conduct, rules 1.1 [competence], 1.3 [diligence], 1.4 [communication].) The defendants point to Hardy's testimony that he did not review the Boudreau report because it was beyond the scope of his client's instructions in connection with the aborted 2005 transaction, but this contention strikes us as a reach given Hardy's dual role as counsel and broker and his undisputed lead responsibility for the due diligence investigation through completion of the transaction in 2006.

Even setting to one side Winter, Hardy and what they knew or should have known of the Boudreau report, Hyde knew or should have known the Ram's Gate principals had received the HLA proposal before escrow closed, which also informed them there were "active fault traces in the vicinity of the existing winery buildings." At the point in time when Hyde says he became aware of the Boudreau report in 2010 (although he had apparently received it from Hardy in 2008), the fact it had been pulled from Hardy's

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[16] Roche has not established conclusively that Hardy retained the binder when he left the Clement firm, but the fact that Hardy forwarded it to Hyde in 2008 raises an inference that he kept it or retrieved it for use during the 2006 due diligence period. We deal with an anti-SLAPP motion, which requires Roche to show only a prima facie case of his malicious prosecution action. (*Sweetwater*, *supra*, 6 Cal.5th at p. 940.)

binder compiled during the 2005 aborted winery purchase should have alerted Hyde that the Boudreau report or information derived from it was actually or constructively known by Hardy—and by John—in 2005.

O'Neill, to be sure, says he had no actual knowledge of the existence of the Boudreau report until August 2008 and had not seen a copy of it before March 4, 2010. Hyde suggests the duty of loyalty to the client allows an attorney to file an action based on uncorroborated statements by a client, citing *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 626 and *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512–513 (both disapproved on other grounds in *Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 973). The rule is otherwise when, as here, the attorney possesses knowledge of *specific facts* directly calling into question the truth or legal substance of the client's claims or indicating that a fundamental element of his or her client's case is unmeritorious. (See *Sheldon Appel*, *supra*, 47 Cal.3d at pp. 877–882.)[17] John's tepid disavowal of prior knowledge of the Boudreau report, together with legal research into the doctrine of imputed knowledge, surely should have led Hyde to abandon any impulse to drag Roche into years-long litigation when, by operation of law, causation of damages and justifiable reliance could not be proved.

The facts known to Hyde, O'Neill and John in March 2010 at least should have triggered further investigation before they filed the underlying action. As Civil Code

[17] (See also *Daniels v. Robbins*, *supra*, 182 Cal.App.4th at p 223; *Morrison*, *supra*, 103 Cal.App.4th at p. 513 [where attorney is "on notice of specific factual mistakes in the client's version of events"]; *Swat-Fame*, *supra*, 101 Cal.App.4th at p. 627; *Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152, 156–157 (*Arcaro*).) In such circumstances, at least, " 'an attorney has a duty to investigate the facts underlying a client's claims and can be sanctioned for failing to do so.' " (*Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 29; see also *Cuevas-Martinez*, *supra*, 35 Cal.App.5th at p. 1121 [holding an attorney may rely on the client's assertions at the beginning of the case, but "may not continue to do so if the evidence developed through discovery indicates the allegations are unfounded or unreliable"].)

section 19 sets forth, "Every person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he or she might have learned that fact." When a party or an attorney is on notice that an element of a proposed complaint is subject to factual refutation, he or she should not proceed to file a lawsuit without investigation. (See *Arcaro*, *supra*, 77 Cal.App.4th at pp. 156–157 [creditor could be sued for malicious prosecution where the opposing party had put it on notice that his signature had been forged on the credit application].) As filed and as litigated, no cause of action resting on the premise that Ram's Gate had been unaware of an earthquake fault or active fault trace on the winery property at the close of escrow was objectively tenable.

D. Malice

The Ram's Gate defendants do not contend on appeal that evidence of their malice was lacking, but Hyde does. The singular aggressiveness of his position, in our view, betrays its weakness. Hyde is in the least credible position to make such a claim, since it was Hyde who discovered the Boudreau report in Hardy's binder before filing the underlying action. It was Hyde who, as the attorney representing Ram's Gate, was responsible for undertaking a reasonable investigation into the facts before making irresponsible accusations in a pleading.

The fact that the defendants filed and maintained an action that lacked probable cause raises an inference of malice, though insufficient of itself to establish a prima facie case. (*HMS Capital*, *supra*, 118 Cal.App.4th at p. 218.) Ethically questionable decisions by Hyde not to produce Hardy's binder in discovery solidify the showing. His evidentiary attack on the malice element of Roche's claim is therefore without merit. Roche showed a probability of success on the merits of his malicious prosecution action sufficient to withstand the defendants' anti-SLAPP motions.

III. DISPOSITION

The trial court's order of January 31, 2017, denying defendants' anti-SLAPP motions is affirmed. Roche shall recover his costs on appeal.

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STREETER, J.

We concur:

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POLLAK, P.J.

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BROWN, J.